

SERVED: August 26, 1992

NTSB Order No. EA-3650

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of August, 1992

_____)	
THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10612
v.)	
)	
ROBERT M. WEICHERT,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The respondent has appealed from the oral initial decision Administrative Law Judge Jimmy N. Coffman issued in this proceeding on May 23, 1990, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed an order of the Administrator revoking respondent's commercial pilot certificate on allegations that he violated

¹An excerpt from the hearing transcript containing the initial decision is attached.

sections 91.15(a), 47.3(b), 91.27(a)(1) and (a)(2), 91.29(a), 91.30(a), 91.165 of the Federal Aviation Regulations ("FAR"), 14 C.F.R. Parts 47 and 91.²

²FAR §§ 91.15(a), 47.3(b), 91.27(a)(1) and (2), 91.29(a), 91.30(a), and 91.165 provided in relevant part at the time of the allegations as follows:

"§ 91.15 Parachutes and parachuting.

(a) No pilot of a civil aircraft may allow a parachute that is available for emergency use to be carried in that aircraft unless it is an approved type and....it has been packed by a certificated and appropriately rated parachute rigger within the preceding 120 days....

§ 47.3 Registration required...

(b) No person may operate an aircraft that is eligible for registration under section 501 of the Federal Aviation Act of 1958 unless the aircraft....Has been registered by its owner....

§ 91.27 Civil aircraft: Certifications required.

(a) Except as provided in § 91.28, no person may operate a civil aircraft unless it has within it the following:

- (a)(1) An appropriate and current airworthiness certificate....
- (a)(2) A registration certificate issued to its owner.

§ 91.29 Civil aircraft airworthiness.

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.30 Inoperable instruments and equipment for multiengine aircraft.

(a) No person may take off a multiengine civil aircraft with inoperable instruments or equipment....

§ 91.165 Maintenance required.

Each owner or operator of an aircraft shall have that aircraft inspected as prescribed in §§ 91.169, 91.171, and 91.172....In addition, each owner or operator shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating that the aircraft has been approved for return to service."

Respondent contends on appeal that the law judge's initial decision and order should be reversed, as it is not supported by a preponderance of the evidence and because the proceedings are defective on several procedural grounds. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision and order.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's revocation order.

For the reasons that follow, we will deny respondent's appeal.

The gist of the Administrator's complaint is that respondent operated a DeHavilland DHC-2 Beaver aircraft on more than one occasion for the purpose of transporting parachutists, when that aircraft was unregistered, uninspected, and unairworthy.

The evidence presented by the Administrator established that respondent bought the DeHavilland at a Sheriff's sale in 1982 for \$9,500. The plane was not, in its previous owner's words, in "flyable" condition at the time of the sale.³

Respondent employed a certificated airplane mechanic who performed repairs and maintenance on a regular basis, but the

(..continued)

³According to the FAA inspector who testified, the last time the aircraft was seen by an FAA inspector it was "in parts," and there is no record of when it was re-assembled, or by whom.

mechanic testified that he never performed an annual inspection on the aircraft. According to the aircraft logbook, the last annual inspection was performed on this aircraft in 1980.

On October 2, 1985, an FAA airworthiness inspector performed a ramp inspection of the aircraft.⁴ The inspector discovered multiple unairworthy conditions, and he immediately placed a condition notice on the aircraft informing respondent not to operate the aircraft without correcting those conditions. According to the testimony of more than one skydiver, respondent nonetheless operated the aircraft on at least two occasions subsequent to the ramp inspection, in complete disregard of the condition notice. The investigating FAA inspector also testified that the pilot's reserve parachute had not been inspected within 120 days, according to the tag on the parachute, which he examined on October 2, 1985. Respondent's aircraft mechanic testified that he saw the condition notice and that he did not disagree with any of the inspector's observations.

Respondent produced only one witness, his former secretary, who claims that, notwithstanding the inspector's testimony

⁴Respondent contends that the "evidence," i.e., the inspector's observations during the ramp inspection, should have been excluded because the inspector did not have a search warrant to conduct the inspection. Respondent fails to cite any legal authority in support of this contention, and the Board is unaware of any legal precedent requiring an extension of Fourth Amendment protections to the gathering of evidence used in FAA enforcement proceedings.

that the parachute he inspected showed that the last inspection was in May, 1985, this parachute had been recertified in August, 1985.⁵ She also claims she sent a piston out for overhaul and repair in late August, 1985, which precluded the operation of the aircraft on subsequent dates.⁶ The law judge rejected the secretary's testimony as not credible.⁷ We concur, and therefore we will adopt the law judge's factual findings as our own. Accordingly, we reject respondent's contention that the Administrator failed to establish the allegations by a preponderance of the evidence.

⁵The secretary testified that the parachute was inspected by a certificated rigger named Jerry Kessler. However, the rigger who testified on behalf of the Administrator stated that he knows Kessler very well, and that Kessler is not, and never has been, a rigger. (TR-84). Thus, respondent's assertion that the delay between the alleged offenses and the service of the notice of proposed certificate action prevented him from presenting Kessler's testimony, because he is now "unavailable," is unpersuasive, because Kessler's testimony would have been irrelevant. Respondent also claims that before the hearing in this matter "someone" stole the parachute and reinspection card with the subsequent annotation. However, the FAA inspector saw only one date on that card, May, 1985, when he examined the card in October, 1985.

⁶This witness also testified that in October, 1989 she no longer worked for respondent but for Susan Weichert, whose relationship with respondent is not explained in the record, but whose business address is the same as respondent's. In any event, the witness testified that she received and signed for the Order of Revocation issued by the Administrator, which she then gave to respondent.

⁷According to the parachute rigger who inspected the parachute in May, 1985, respondent called him on the day of the ramp inspection and told him he had forged his signature on the registration card, and asked him to annotate his logbook accordingly. The rigger declined to do so, and informed the FAA.

We turn next to the procedural issues raised on appeal. First, respondent contends, the Administrator's complaint should have been dismissed as stale, because the offenses alleged occurred more than six months from the date of the Notice of Proposed Certificate Action. As the Administrator points out in his reply brief, a complaint is not dismissible under the Board's stale complaint rule where the allegations presented in the complaint raise an issue of lack of qualifications. See 49 C.F.R. 821.33(b)(2). Under the circumstances presented in this particular revocation order, we entertain no doubt that, if true, they presented the issue as to whether respondent lacked the care, judgment, and responsibility to hold an airman certificate.

Respondent's assertion that service of the complaint was defective is also unavailing. Neither the Federal Rules of Civil Procedure, relied on by respondent, nor the Board's Rules of Practice control service of the Administrator's orders, and there is no requirement for personal service of the complaint. Administrator v. Hamilton, NTSB Order No. EA-2743 at 8 (1988). Thus, service of the complaint to respondent's address of record, where it was signed for by a secretary who used to work for respondent and who still works in the same building, and who actually delivered the complaint to him, as she had done with other mail on more than one occasion, must be evaluated in terms of general law principles. Administrator v. Heinberg, 5 NTSB 917, 918

(1986). We find that the service here constitutes at least constructive service of the complaint on respondent.

Administrator v. Hayes, 1 NTSB 1693 (1972), aff'd mem., Hayes v. National Transportation Safety Board, 477 F.2d 450 (D.C. Cir. 1973).⁸

Respondent also contends that the proceedings should be dismissed because he was not provided with a "mandatory pre-suspension hearing," citing Pastrana v. United States, 746 F.2d 1447 (11th Cir. 1984). Pastrana is inapposite. That case involved the suspension of an airman certificate by an FAA inspector, who seized the certificate immediately after a ramp inspection. Section 609(a) of the Federal Aviation Act, 49 USC App. section 1429(a) requires that the holder of a certificate be provided an opportunity to answer any charges and be heard as to why the certificate should not be amended, modified, suspended, or revoked, before that certificate action is taken. That opportunity to be heard at the agency level, before issuance of the order, is given when an airman is offered an informal conference with FAA counsel. Oceanair of Florida v. National Transportation Safety Board, 888 F.2d 757, 769 (11th Cir. 1989); FAR section 13.19(c).⁹ In this

⁸Respondent also argues that the complaint should be dismissed as it was not accompanied by proof of service upon respondent when filed with the Board. See 49 C.F.R. § 821.31(a). Respondent's contention is erroneous. The complaint contained in the Board's file in fact contains the requisite proof of service.

⁹FAR § 13.19(c) also provides that the Administrator's order may be issued by, among others, the Regional Counsel concerned.

case, respondent was afforded the opportunity to meet with FAA counsel in an informal conference, and, according to the Administrator's order, an informal conference in fact occurred on February 22, 1989. Respondent's claim, therefore, is without merit. Respondent asserts that the Administrator should have been precluded from presenting certain evidence because his response to respondent's requests for discovery did not comply fully with respondent's demands. The Board's Rules of Practice, specifically 49 C.F.R. section 821.19, provides for the exchange of information by parties. The Rule also provides that, in the event of a dispute, the law judge may issue an order directing compliance with any ruling he has made in respect to discovery. Thus, respondent's remedy was to file a motion with the law judge, asking him to compel the Administrator to comply with his discovery request. Only then would the preclusion of evidence be appropriate, if the Administrator failed to comply or otherwise explain his reasons to the law judge. Similarly, respondent's claim that one of the witnesses should not have been allowed to testify because he

(..continued)

The Board has recognized that a staff attorney may sign an order issued in the name of and under the authority of the Regional Counsel. See, e.g., Administrator v. Smith, 3 NTSB 3942, 3943 (1981), citing Administrator v. Interair Services, Inc., 3 NTSB 1715, 1718 (1979). Respondent claims that the Administrator's order here is nonetheless defective because it is signed by a staff attorney from the Office of the Assistant Chief Counsel for the Eastern Region. We agree with the Administrator that the mere fact that the Regional Counsel's title has been changed to Assistant Chief Counsel for the Region does not render an otherwise valid order fatally defective.

failed to appear for a deposition is also without merit.¹⁰ Respondent fails to articulate any prejudice arising from his inability to depose the witness before hearing. If he was unprepared to cross-examine the witness on the day of the hearing the appropriate remedy would have been to request a continuance.

Finally, respondent asserts, without explanation or argument, that the sanction of revocation is excessive. We disagree. Respondent violated several sections of the Federal Aviation Regulations. He transported parachutists in an unairworthy aircraft, and in complete disregard of a condition notice which was served on him by one of the Administrator's inspectors. The evidence of record amply establishes that respondent lacks the care, judgment, and responsibility to hold any airman certificate.

¹⁰ Respondent did not follow the Board's rules in that he did not serve a copy of the subpoena on the Administrator. We fail to understand how under such circumstances respondent can in good faith argue that the Administrator should be sanctioned by the preclusion of that witness' testimony, when the Administrator had no notice that the witness, who is not a Federal employee, had been subpoenaed for the deposition.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's revocation order and the initial decision are affirmed; and
3. The revocation of respondent's commercial pilot certificate shall commence 30 days from the date of service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹¹For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).